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Mallory Engineering, Inc v. Ted R. Brown & Associates, Inc and Valad Electric Heating Corp : Reply Brief of Brown In Opposition To Valad's Brief In Support of Petition For Rehearing On Issue of Jurisdiction and In Support of Reconsideration of the Issue of Damages

Utah Supreme Court

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. William J. Cayias and Quentin Alston; Attorneys for Respondent Mallory Engineering, Inc. Allen H. Tibbals; Attorney for Respondent and Appellant Ted R. Brown & Associates Godfrey P. Schmidt and Robert B. Sykes, attorneys for Appellant Valad Electric Heating Corp.

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IN THE SUPREME COURT OF THE STATE OF UTAH

MALLORY ENGINEERING, INC.,	:	
	:	
Plaintiff and Respondent,	:	
	:	
vs.	:	
	:	
TED R. BROWN & ASSOCIATES,	:	
INC.,	:	Supreme Court No. 15530
	:	
Defendant, Counterclaimant,	:	
Crossclaimant, Respondent,	:	
and Appellant,	:	
	:	
and	:	
	:	
VALAD ELECTRIC HEATING CORP.,	:	
	:	
Defendant, Cross-Defendant,	:	
Counterclaimant and	:	
Appellant.	:	

REPLY BRIEF OF BROWN IN OPPOSITION TO VALAD'S BRIEF IN SUPPORT
OF PETITION FOR REHEARING ON ISSUE OF JURISDICTION AND IN
SUPPORT OF RECONSIDERATION OF THE ISSUE OF DAMAGES

Appeal from the Judgement of the Third Judicial District Court
of Salt Lake County, the Honorable G. Hal Taylor, Judge

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Valad Electric Heating Corp.

FILED

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NATURE OF THE CASE

Valad Electric Heating Corp. is a New York corporation with headquarters in Terrytown, New York. It contracted to supply electrical heaters to be utilized by a Utah corporation, Mallory, in a project Mallory was constructing in the State of Utah for the United States Government. Valad's heaters proved to be defective and this case arose out of that failure to perform.

DISPOSITION OF THE CASE ON APPEAL

The lower Court, after trial, awarded judgment to Mallory against Valad and Ted R. Brown & Associates, and to Ted R. Brown & Associates, Inc. against Valad. Valad having raised the issue of jurisdiction based upon the Long Arm Statute, the Supreme Court found that jurisdiction existed. By Petition for Rehearing, Valad seeks to challenge that portion of the decision. The District Court made a liberal allowance of consequential and unrelated damage. This action of the District Court was protested on the main appeal by both Valad and Brown. The Supreme Court decision does not deal with the problem raised on damages and merely affirms the action of the lower Court.

RELIEF SOUGHT ON THE REHEARING

Brown seeks to have the Court uphold its decision on the issue of jurisdiction over Valad and to reconsider and to modify the allowance of damages by eliminating the consequential and indirect damages not properly allowable under the Commercial Code or established criteria for the allowance and establishment of damages in a contract action of this nature.

SUMMARY OF THE FACTS

Exhaustive and detailed factual statements were made in the briefs filed on the main appeal. It is not deemed helpful to the Court to reiterate the lengthy statements therein made. In brief, it may be stated that Mallory, plaintiff and respondent, is a company engaged in the manufacture of certain components utilized by the government in the nature of a test chamber and that in the execution of a contract which it had with the government, it required certain types of electrical heaters that would perform in accordance with a fixed criteria. In order to obtain these heaters, Mallory consulted with Ted R. Brown &

Associates, a sales engineering firm. Ted R. Brown & Associates supplied advertising literature and catalogue data relative to the manufacturing potentials of Valad Electric Heating Corporation and ultimately received an order from Mallory for certain heaters to be incorporated in the product Mallory was manufacturing for the United States Government. Brown passed this order on to Valad for manufacture, delivery, and warranty. Some of the heaters manufactured by Valad proved to be defective. The remainder were never delivered by Valad. Valad has claimed that it did not submit itself to the jurisdiction of the Utah Courts by contracting to provide these heaters to Mallory. Brown took the position in the original action that Valad did submit itself to the jurisdiction of the Court under the Long Arm Statute of the State of Utah, 78-27-24, UCA 1953, as amended. This Court affirmed the action of the District Court in finding jurisdiction existed over Valad in the Utah Courts. Any additional factual information necessary to the consideration of this matter will be set forth in and under the argument.

ARGUMENT

POINT I

THE DECISION OF THE SUPREME COURT UNDER DATE OF MARCH 6th, 1980, ON THE ISSUE OF JURISDICTION OVER VALAD IS CORRECT, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, AND NO REHEARING ON THIS ISSUE SHOULD BE GRANTED.

The petitioner for rehearing, Valad Electric Heating Corp., seeks to substantiate an attack upon the decision of this Court finding jurisdiction over Valad upon a recent case decided by the Supreme Court of the United States entitled World-Wide Volkswagen Corp. vs. Woodson. In addition, the petitioner for rehearing seeks to indicate that by reason of the transaction being "an isolated occurrence", in some manner the finding of jurisdiction constitutes a violation of the Fourteenth Amendment of the United States Constitution. Neither position can be substantiated.

Factually, the case of World-Wide Volkswagen Corp. vs. Woodson is so totally distinct from the facts involved in the instant case before this Court, that no parallel can be drawn from that decision. The World-Wide Volkswagen case, decided January 21st, 1980, by the Supreme Court of

the United States, opinion No. 78-1078, involved a situation in which Harry and Kay Robinson, residents of the State of New York, bought an Audi automobile from Seaway Volkswagen, Inc., an automobile dealer with headquarters in Messina, New York, in the year 1976. The following year the Robinson family, residents of the State of New York, left that State to establish a new home in the State of Arizona. As they passed through the State of Oklahoma in route to Arizona, their car was struck in the rear by another car and a fire resulted which burned Kay Robinson and two of the children rather severely. The Robinsons thereafter brought a products liability case in the District Court for Creek County, Oklahoma, claiming that the injuries resulted from defective design and placement of the gas tank and fuel system on the Audi car. There had been no contact whatever with anyone in the State of Oklahoma in regard to this motor vehicle or its use in that State, and the sole basis upon which it could be contended that the dealer and the manufacturer could be held to be subject to the jurisdiction of the Oklahoma Court was on the basis that an automobile being transitory by nature, might reasonably be anticipated to be used in any State and consequently, the Courts of any State might have jurisdic-

tion over a manufacturer or dealer.

The Supreme Court of the United States found specifically that this did not come within the purview of Long Arm jurisdiction and that personal jurisdiction could not be established over the dealer or the manufacturer under these facts. The opinion of the Supreme Court specifically recognizes that the limits imposed on State jurisdiction by the Due Process Clause of the Constitution has been substantially relaxed over the past years. However, the Supreme Court reiterated that:

"Hence, even while abandoning the shibboleth, that 'the authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established' Pennoyer vs. Neff, supra at 720, we emphasize that the reasonableness of asserting jurisdiction over the defendant must be assessed 'in the context of our federal system of government' International Shoe Co. vs. Washington, supra at 317, and stressed that the Due Process Clause insures, not only fairness, but also the 'orderly administration of the laws.' As we noted in Hanson vs. Denkla, 357 U.S. 235:

'As technological progress has increased the flow of commerce between the States, the need for jurisdiction over the nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to

these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of Pennoyer vs. Neff, 95 U.S. 714, to the flexible standard of International Shoe Co. vs. Washington, 326 U.S. 310."

The Court, in the remainder of its opinion, points out that the minimum contacts referred to in the International Shoe Co. case must be found, but that in establishing these contacts, it must be fair and equitable and just so to do. It points out that foreseeability is a criteria that has merit and that in this case, there was no reasonable way to foresee that a car sold to a New York resident in the State of New York by a New York dealer might subsequently be involved in an accident in the State of Oklahoma and that a claim against the dealer and the manufacturer would arise out of this accident. The Court in applying this standard said:

"But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendants' conduct in connection with the forum State are such that he should reasonably anticipate being haled into court there. See Kulko vs. Superior Court, supra, at 97-98; Shaffer vs. Heitner, supra, at 216; and***The Due Process Clause, by ensuring the 'orderly administration of the laws,' International Shoe Co. vs. Washington, gives a degree of

predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

"When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' Hanson vs. Denkla, supra, at 253, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.***"

Certainly, in this case, Valad had every notice that it was engaging in a transaction wherein failure to perform satisfactorily might result in its being held to account in the Courts of the State of Utah. The initial contacts made with Valad were made telephonically from Mr. Nyman of Brown, to Mr. Ceccini of Valad. It was clearly indicated in these preliminary telephone conversations that Valad was being solicited to specially manufacture a product for use by a Utah resident in the accomplishment of the purposes of that Utah resident. As the matter progressed and there were further telephone conversations and the exchange of written criteria and diagrams with which the limits of performance were more specifically delineated, it was made clear that the product which Valad was to manufacture for

Mallory had to be warranted and guaranteed by Valad to Mallory to perform in the context in which it was to be placed. All of this clearly put the Valad Electric Heating Corp. in the position of knowingly contracting to supply services or goods in the State of Utah. In addition, it knew that it was issuing a certificate of guarantee or warranty to the ultimate user, namely, Mallory, which corporation was incorporating the heater in a product it was in turn manufacturing for the United States Government.

No reasonable interpretation of the acts of the parties could have possibly said that Valad could not, under such circumstances, contemplate that it might be held accountable for any failure on the part of its product by an action in the Courts of the State of Utah. We respectfully submit that the attempt by Valad to utilize the decision of the Supreme Court in the World-Wide Volkswagen case, as a ground for contesting the decision of this Court establishing jurisdiction over Valad is a misapplication of the World-Wide Volkswagen case and its facts. We specifically direct to the Court's attention that the isolated occurrence criteria which is relied upon by counsel in its petition for rehearing has no bearing where there has been a deliberate

and conscious contract made and entered into to supply goods or services in the State of Utah by an out of state company.

We respectfully submit that the decision of the Supreme Court sustaining the lower Court in finding that jurisdiction over Valad by the Courts of this State did exist under the Long Arm Statute is a good and valid decision and should not be altered.

POINT II

THE COURT SHOULD RECONSIDER THE MATTER OF DAMAGES AND ALTER THE AWARD BY THE LOWER COURT TO CONFORM TO THE ACCEPTED MEASURE OF DAMAGES AND IN RECOGNITION OF THE RELATIVE CULPABILITY OF THE PARTIES.

The defendant, Ted R. Brown & Associates, Inc., requests that the Court review the issue of damages. It is not deemed necessary that there be a rehearing, but in the main opinion the Court did not treat the subject of damages, though it was raised and argued in all briefs on the main case.

While the Commercial Code recognizes the right in the event of breach for the buyer to recover incidental and consequential damages as set forth at 70A-2-715 of the

Uniform Utah Commercial Code, the failure of the Court to apply the standards acknowledgedly acceptable in determining what constitutes consequential and incidental damage, opens the door to abuse in the future. The method utilized by the respondent, Mallory, to compute damages, which it refers to as "the job completion method", has no relevance to the ascertainment of actual damage, including consequential or incidental damage which is allowable under either the former criteria prior to the adoption of the Commercial Code, or under the Commercial Code. Particularly, we point out that for the Court not to recognize the distinction between the liability of Brown and the liability of Valad results in a gross injustice and inequity. All parties to the transaction recognize that Brown was not responsible for the manufacture of the ordered heaters. The order was placed with Valad by Brown with the full knowledge and consent of the ultimate purchaser, Mallory. Mallory requested a direct guarantee from the fabricator. All of this has been previously set forth in the briefs of the parties. The District Court drew no distinction between the culpability of Brown and the culpability of Valad. Even the citations by the respondent, Mallory, in its brief, refer to:

"If the defendant has been responsible for the plaintiff's incurring or wasting reasonably foreseeable overhead expenses***" (Brief of Respondent Mallory, Page 32)

Brown was in no way responsible for the plaintiff's incurring or wasting overhead expense. Brown properly placed the order after having conformed with Mallory's requests in every particular. No one pointed out any substantial differentiation between the order as placed by Brown and the order as placed by Mallory with Brown. It was transmitted intact, accompanied by a copy of the original order from Mallory to Brown, to Valad as the fabricator. Valad's failure to fabricate in accordance with the order resulted in whatever damage occurred. To permit Mallory the option of holding Brown responsible, and satisfying itself against Brown and compelling Brown to proceed against Valad to try and collect the judgment in a foreign State, gives a degree of protection to Mallory that it is not entitled to under the facts and circumstances of this case.

We respectfully urge that the Court review again the issues presented by the briefs concerning damages and adjust the matter of damages in accordance with the substantial equities between the parties.

CONCLUSION

The requested rehearing on the issue of jurisdiction should be denied. Damages should be reconsidered and adjusted in accordance with the law and equity between the parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Hand Delivery

I hereby certify that I served a copy of the foregoing REPLY BRIEF OF BROWN IN OPPOSITION TO VALAD'S BRIEF IN SUPPORT OF PETITION FOR REHEARING ON ISSUE OF JURISDICTION AND IN SUPPORT OF RECONSIDERATION OF THE ISSUE OF DAMAGES upon the attorneys for Mallory and Valad by causing a true and correct copy thereof to be hand delivered to said persons at their offices at the following addresses:

William J. Cayias
Mr. Quentin Alston
1558 South 11th East
Salt Lake City, Utah 84105

and

Robert B. Sykes
320 South 300 East, Suite 2
Salt Lake City, Utah 84111

on this 7th day of May, 1980.

ALLEN H. TIBBALS
Attorney for Ted R. Brown &
Associates, Inc.

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing brief of Ted R. Brown & Associates, Inc. to Godfrey P. Schmidt, Attorney for Valad Electric Heating Corp., 654 Madison Avenue, New York, New York 10021, postage prepaid, this 7th day of May, 1980.
